

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE: BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION  
(MDL No. 2406)**

**Master File No. 2:13-CV-20000-RDP**

**This document relates to Provider-  
Track cases.**

**DEFENDANTS' REPORT ON ISSUES THAT REQUIRE RESOLUTION  
BEFORE REMAND**

Based on the Court's direction during the May 16, 2022 Status Conference, the Blues anticipated submitting a joint report laying out their respective positions on the issues that should be resolved by the Court before the Provider-track cases transferred to MDL No. 2406 for pre-trial purposes may be remanded to their transferor jurisdictions. (Doc. 2921 (5/16/22 Hr'g Tr.) at 14:23–18:5.) While the Blues were in the process of sending their portion of the joint report to Providers, we learned that Providers filed separately. (See Doc. 2925.) As such, the Blues now respectfully submit their position.

Specifically, the Blues believe that the Court should take the following steps before considering any of the coordinated cases to be ripe for remand:

1. The Court should issue a decision on the motions that the Blues and Providers have asked the Court to prioritize and to resolve in the near-term. (Doc. 2921 (5/16/22 Hr'g Tr.) at 13:16–22.) These motions are (i) the Providers' Motion for Class Certification and related motions (*i.e.*, *Daubert* motions) (Docs. 2604–05, 2642 (Class Certification Brs.); Docs. 2466, 2471, 2476, 2478, 2480, 2631–36, 2639, 2665–66, 2668, 2690–92, 2695, 2707–10 (*Daubert* Mots.)); (ii) the Blues' Standard of Review Motion for a standard of review with respect to ESAs alone (Docs. 2727–28, 2747, 2772); and

(iii) Providers' Standard of Review Motion for a standard of review with respect to their group boycott claims (Docs. 2729, 2760, 2770).

2. The Court should issue a decision on the other pending motions for summary judgment filed to date, which are (i) the Blues' Motion for Summary Judgment on All Claims Advanced by Non-General Acute Care Hospital Providers and Any Claims Based on Blue System Rules Other than ESAs or BlueCard for Failure to Demonstrate Injury or Damages (Docs. 2750–51, 2797, 2819); (ii) the Blues' Motion for Summary Judgment on Providers' Damages Claims as Time-Barred and Speculative (Docs. 2761–62, 2798, 2823); (iii) the Providers' Motion for Partial Summary Judgment on the Blues' Claim to Common-Law Trademark Rights (Docs. 2749, 2800, 2821); and (iv) the Providers' Motion for Partial Summary Judgment on the Blues' Single Entity Defense (Docs. 2748, 2801, 2820).

3. Once all summary judgment motions are decided, the parties should be afforded an opportunity to file, and the Court should resolve, any motions for summary judgment contingent on class certification consistent with the Court's operative Eighth Amended Scheduling Order. Specifically, when inviting the parties to file the currently pending motions, the Court directed the parties to limit their motions to those that "are not critically dependent on the outcome of class certification." (Doc. 2767 (Order Modifying Eighth Am. Scheduling Order).) Thus, depending on the Court's ruling on class certification, there may be further summary judgment grounds that should be resolved prior to remand. (*See* Doc. 2757 (Defs.' Notice of Other Potential Mots.); *see also* Doc. 2458 (6/20/2019 Hr'g Tr.) at 8:14–24 (The Court: "[D]epending on what class is certified, it may or may not change significantly the motion practice; but we can't

know that until we actually see what's certified. . . . I can see where what class gets certified perhaps, particularly on the provider side, may speak to questions like demonstrable harm, the market definition that gets played out on a rule-of-reason analysis, all sorts of things like that.”).)

4. Given the extensive, multi-year discovery conducted in this case to date, the Blues disagree with Providers that discovery should be reopened as to any issue. Providers, however, have stated that further discovery may be required, including regarding the effects of eliminating the National Best Efforts rule (“NBE”). (Doc. 2918 (Pls.’ Notice of Supp’l Auth.) at 2–3; Doc. 2924 (Pls.’ Supp’l Auth. Reply) at 1.) NBE was a Subscriber-facing rule for which Providers have claimed no damages (*see, e.g.*, Doc. 2772 at 13–15), and the Blues disagree that additional discovery on this topic is warranted. However, to the extent the Court permits additional discovery on that (or any other) issue, such discovery should be coordinated within the MDL prior to remand.

5. It is premature to set a trial date now, given that resolution of the numerous outstanding issues outlined above could impact the need, contours and timing of any trial. Accordingly, the parties should meet and confer at an appropriate time about trial scheduling issues, including whether there is any issue that should be tried ahead of remand based on the rulings received to date. For instance, it may make sense to resolve in advance of remand the common issue of whether the Blues are a single entity for purposes of governing the federally registered Blue marks. Resolution of this issue could significantly streamline the scope of the remaining litigation (indeed, the Blues maintain that this issue will foreclose remaining Section 1 claims altogether).

As to Providers' suggestion that they may seek to amend their complaint, this request implicates Federal Rules of Civil Procedure 15 and 23. It is premature to determine whether an amended complaint is warranted, particularly since it is unclear what amendments Providers are considering more than a decade into this case. As such, Providers should propose the specific amendments they seek to make, following which the parties should meet and confer.<sup>1</sup>

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<sup>1</sup> As to Providers' suggestion that the Court should enter an order establishing a common benefit fund, the Blues reserve their right to address that issue at the appropriate time. In no event should establishment of a common benefit fund impact or burden Defendants in any way.

Dated: June 16, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 16, 2022, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

*/s/ Evan R. Chesler*  
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